IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAOs (Ord.) No.489, 490, 491, 492, 493 & 494 of 2002.

Judgment reserved on : October 8, 2007.

Date of Decision : November 21, 2007

FAO (Ord.) No.489 to 494 of 2002

H.P. State Electricity Board ….Appellant.
(In all the appeals)

Versus

H.P. Electricity Regulatory Commission and another (In all the appeals) ….Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?

For the Appellant(s) : Mr. Shrawan Dogra, Advocate, in all the appeals.

For the Respondent(s) : Mr. Surinder Sharma, Advocate, in all the appeals.

Surjit Singh, Judge

All these appeals are directed against the orders, dated 17th August, 202, of State Regulatory Commission, hereinafter referred to as Commission, passed in six separate matters, whereby Himachal Pradesh State Electricity Board through its Secretary (appellant), hereinafter referred to as Board, has been ordered to pay different amounts of money by way of penalty as also additional penalty at different rates for continuing failure to comply with the directions, from 15th January, 2002 till the compliance, to the satisfaction of the Commission, of its six different directions contained in the Tariff Order, dated 29th October, 2001, and other appellants have been discharged with stern warning that in future the commission would deal with any contravention of its direction by holding them jointly and severally liable

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Whether reporters of the local papers may be allowed to see the judgment?

for the purpose of imposition of penalty, under Section 45 of the Electricity Regulatory Commission Act, 1998, hereinafter referred to Act of 1998, on account of non-compliance of its directions. Since common questions of law and facts have been raised in all these appeals, they are being disposed of by a common judgment.

2. It appears that the State Regulatory Commission, constituted under the provisions of the Act of 1998, which Act has since been repealed by the Electricity Act, 2003, hereinafter referred to Act of 2003, was approached by the Board to determine the tariff for electricity, in discharge of one of its functions, under Section 22(1) of the Act of 1998. The commission, while determining the tariff vide order dated 29th October, 2001, issued certain directions to the Board. The directions, which were issued and the non-compliance whereof gave rise to the passing of the impugned orders are as follows:

(a) Furnishing of information and also periodical reports with respect to the value of the assets and capital projects of the Board.

(b) Replacement of all dead and defective meters by electronic meters from 31st March, 2002 onwards and reporting the status, as on 31st December, 2001 by 31st March, 2002.

(c) To develop and implement a comprehensive public interaction programme through Consultative Committees, preparation, publication and advertisement of material helpful to various consumer interest groups and general public on various activities of the utility, dispute settlement mechanism, accidents, rights and obligations of the consumers etc. Accordingly, the Board was directed on September 22, 2001, to submit its plan for approval of the Commission and implement the same by 31st March, 2002.

(d) Submission of plans, short term and long term, by 31st March, 2002, for rationalization of existing manpower for improvements in efficiency through scientific engineering resources management, improving and updating the organization strategies and systems and skills of human resources for increased productivity. The Board in its affidavit of 3rd October, 2001 has agreed to comply and submit the above study by the above-mentioned date.

(e) Submission of a plan by 31st March, 2002, for reducing loss, both technical and non-technical, together with relevant load flow studies and details of investment requirement to achieve the planned reductions. The Commission also observed in its interim order on 20th September, 2001 passed in the course of public hearing that investments must aim at reducing the T & D losses and better quality of supply and service to the consumers as it happened in the case of Palampur area which has mixed domestic and commercial loading. The strategy can be considered for adoption elsewhere also to produce similar results. The Board has confirmed and undertaken to complete this study by 31st March, 2002.

(f) To do a comparison of the capital costs of Malana Plant with the capital costs of HPSEB Plants and submit a report on this by 31st March, 2002.

3. Board filed the first report on 25th February, 2002 and that too after being reminded by the Commission. Report did not show any progress but contained, in the words of the Commission, alibis, excuses and reasons for failure to comply with the directions and whatever little information was supplied that was found to be “sketchy, insufficient and incomplete”. The Commission, therefore, issued notices to the appellants, under Section 45, affording them an

opportunity of being heard before imposing the penalty for non-compliance of its aforesaid directions. All the appellants appeared and filed replies. They all stated that the Commission did not have the jurisdiction to issue the directions for the alleged non-compliance of which they were sought to be penalized, under Section 45, and, therefore, such directions were nonest and hence there was no question of non-compliance of any of the directions. It was pleaded that the Commission had been authorized by the Governor to discharge the functions, as specified in sub-section (1) and none of the functions specified in sub-section (2) of Section 22 of the Act of 1998 and that the directions, which had allegedly not been complied with, were beyond the purview and scope of sub-section (1) aforesaid. Various other pleas were also raised, which are not relevant for deciding these appeals and, therefore, need not be noticed.

4. The Commission, after hearing the learned counsel for the appellants, passed the impugned orders. It did not agree with the contention of the appellants that it did not have the jurisdiction to issue the directions and, as such, the same were nonest and, hence, the appellants were not legally obliged to comply with the same. The reasons given by the Commission for rejecting the contention are;

(a) per Section 59 of the Electricity Supply Act, 1948, hereinafter referred to Act of 1948, the Board while adjusting its tariffs is duty bound to ensure that its revenues are surplus by not less than three per cent of the value of its assets after meeting all expenses chargeable to revenues and that in view of this provision, while determining the tariff, the Commission had to take into account the value of the assets of the Board and that was why information about the assets was called for;

(b) directions were issued to make the Board a truly, efficient, responsive and dynamic organization and the same were integral part of the Tariff Order dated 29th October, 2001;

(c) dictionary meanings of word “determination” is quality of law; the settlement of a dispute by the aduthoritative decision of a Judge and thus the term ‘determination of tariff’ is all inclusive term of implementation, determination and compliance and it cannot be split into subjective expediency;

(d) the Commission had the jurisdiction under sub-section (1) of Section 22 of the Act of 1998 to issue any direction to achieve the objects and the purposes of the Act and one of such purposes and objects is making the Electricity Boards efficient, responsive and dynamic organizations; and

(e) directions were issued in the larger interest of the Board and the consumers of electricity within the State.

5. After rejecting the aforesaid plea and other points raised by the appellants, the Commission passed the impugned orders of imposition of penalty and warning.

6. When the matter was taken up for hearing, the learned counsel representing the respondent-Commission raised a preliminary objection about the maintainability of the appeals. He submitted that Appellate Tribunal having been established, under Section 110 of the Act of 2003, appeals in this Court ceased to be maintainable and the right course was to transfer the same to the Appellate Tribunal. In support of this contention, he placed reliance on an order of the Hon’ble Supreme Court passed in H.P. State Electricity Regulatory Commission versus H.P. State Electricity Board (Civil Appeal No.7229

of 2005, arising out of the SLP (Civil) No. 19571 of 2005), decided on 5th December, 2005.

7. The precedent relied upon by the learned counsel for the respondent is of no help for determining the objection raised by him. From a perusal of the order of the Hon'ble Supreme Court, it appears that a Writ Petition, being CWP No.250 of 2005, was filed in this Court, challenging an order of the Commission. During the pendency of the Writ Petition, Appellate Tribunal was constituted and made functional. A prayer was made that Appellate Tribunal having been constituted and made functional, it was that Tribunal which had the jurisdiction to adjudicate upon the correctness and the validity of the impugned order of the Commission and so the Writ was not competent. This Court, vide order dated 20th July, 2005, rejected the Commission's contention. The Commission filed Special Leave Petition. The Hon'ble Supreme Court ordered that the Appellate Tribunal having been established and made functional, appeal was required to be filed against the order of the Commission. From the order it is not clear whether the order of the Commission that had been challenged in the Civil Writ Petition was under the Act of 1998 or that of 2003. It appears that probably the order was under the Act of 2003, because the same had been challenged by filing a Civil Writ Petition in this Court. Had it been an order under the Act of 1998, appeal would have been filed in this Court, under Section 27 of that Act.

8. In the present case, admittedly, the impugned orders have been passed under the Act of 1998. The orders were passed on 17th August, 2002 and the present appeals had also been filed in the year 2002. Act of 2003 came into force on 27th January, 2004, per notification dated 27th January, 2004, issued by the Central

Government, Ministry of Power, under sub-section (3) of Section 1 of the Act of 2003.

9. Now, the question arises whether the Act of 2003, which provides for appeals against the order of Regulatory Commissions to the Appellate Tribunal, under Section 111 of it, affects the appeals filed in this Court, before the coming into force of the Act of 2003, under Section 27 of the repealed Act of 1998.

10. Section 111(1) of the Act of 2003 says that any person aggrieved by an order made by an Adjudicating Officer, under this Act or an order made by the Appropriate Commission, under this Act, may prefer an appeal to the Appellate Tribunal for Electricity. Repeal and saving clause, contained in Section 185 of the Act of 2003, vide sub-section (2)(a), saves anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given, under the Act of 1998 and declares such things done or action taken to be deemed to have been done or taken under the corresponding provisions of this Act. Sub-section (5) of Section 185 says that save as otherwise provided in sub-section (2), the mention of particular matters in that sub-section, shall not be held to prejudice or affect the general application of Section 6 of General Clauses Act, 1897, with regard to the effects of repeals.

11. From the combined reading of sub-section (2) and sub-section (5) of Section 185 of the Act of 2003, it appears that while the things done or actions taken under the repealed Act of 1998 have been saved despite the repeal of the said Act and are to be deemed to have

been done or taken under the corresponding provisions of the repealing Act, i.e. the Act of 2003, at the same time the general application of Section 6 of General Clauses Act, 1897, has not been affected.

12. Relevant part of Section 6 of the General Clauses Act says that where an Act is repealed, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, agreed or incurred under the repealed Act or affect any legal proceeding or remedy in respect of any such right, privilege, obligation, liability and any such legal proceedings or remedy may be instituted, continued or enforced.

13. Act of 2003, as noticed hereinabove, vide Section 185, despite saving the acts and things done under the old Act and declaring them to be deemed to have been done or taken under the corresponding provisions of this Act, saves the general application of Section 6 of the General Clauses Act, 1897. If it is so, then not only the pending legal proceedings, which include the appeals against the orders passed under the repealed Act of 1998, remain unaffected, in view of the provisions of sub-section (5) of Section 185 of the Act of 2003 and Section 6 of the General Clauses Act, 1897, but even the right to remedy against the orders passed under the Act of 1998, also remains unaffected, that is to say appeals against the orders passed under the Act of 1998, before its repeal, can be filed under Section 27 thereof even after the coming into force of the Act of 2003, of course subject to Law of Limitation and other technicalities.

14. For the foregoing reasons the objection regarding maintainability of the appeals raised by the learned counsel for the respondent is rejected.

15. As regards the merits of the case, it was not disputed during the course of hearing that no notification had been issued by the State Government conferring upon the Commission any of the functions specified in sub-section (2) of Section 22 of the Act of 1998. That means, the Commission had the authority and the jurisdiction to discharge only those functions which find mention in sub-section (1) of Section 22 of the aforesaid Act. The same is reproduced below.

> **"22. Functions of State Commission.---** (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions namely:--
>
> (a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;
>
> (b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;
>
> (c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources from transmission, sale, distribution and supply in the State;
>
> (d) to promote competition, efficiency and economy inn the activities of the electricity industry to achieve the objects and purposes of this Act.

16. Admitted case of the parties is that the Commission was approached by the Board to determine the tariff for electricity. That means, the Commission was called upon to discharge the function mentioned in sub-section (1)(a) of Section 22 of the Act of 1998. Under this provision, the Commission did not have the jurisdiction to issue any directions, like the ones which it issued and for the non-compliance whereof the impugned orders of penalty have been passed.

17. The reasoning given by the Commission with regard to direction (a) above that since the tariff was to include surplus revenue, to the extent of atleast three per cent of the value of the fixed assets, after meeting all the expenses, in view of the provision of Section 59 of the Act of 1948, therefore, it gave the direction for supplying information pertaining to all the assets of the Board and the capital works, is perverse. The Commission could have asked for this information before the determination of the tariff, because the information had relevance for determination of the tariff. Asking for the information, after the determination of tariff, was preposterous. This reasoning is nothing but an excuse for justifying an order, which is illegal and without jurisdiction.

18. Commission's view that it had the jurisdiction to monitor the working of the Board with regard to collection of revenues, based on the tariff determined by it, vide order dated 29th October, 2001, because the term "determination" means the settlement of a dispute by the authoritative decision of a Judge and "determination of tariff" is an all inclusive term for determination, implementation and compliance, is also perverse. According to the Commission, the dictionary meaning of the word "determination" is "quality of law: the settlement of a dispute by the authoritative decision of a judge". The Commission appears to have read the meaning of word "determination" in part only to the extent it suited it. The word has many meanings and one such meaning is "exact ascertainment". In the context of the present case, it is this meaning which is relevant, because here the term has been used in relation to tariff and the dictionary meaning of word "tariff" is "an arithmetical table or statement; a table of multiplication, a ready reckoner". Therefore, term "to determine the tariff for electricity", as

used in Section 22(1)(a), means ascertainment of the reckoner or arithmetical table for calculating electricity charges.

19. View taken by the Commission that the directions were given to make the Board an efficient, responsive and dynamic organization is also out of context and, hence, absurd. The Commission was called upon to determine the tariff and not to issue any directions to the Board to make it efficient, responsive and dynamic, nor was it any of its functions to issue such directions for making it a 'truly efficient, responsive and dynamic organization'. Thus, according to its own showing, the directions issued by it were without jurisdiction and as such nonest. Therefore, the appellants were not supposed, muchless under any legal obligation, to comply with the same.

20. Commission's observation that the directions were issued in the larger interest of the Board and the consumers is also out of the context. As already noticed, the Commission was approached by the Board to fix the tariff of electricity. Once the tariff had been fixed the job of the Commission was over. It became *functus officio* once the function of determination of tariff had been performed. The interests of the Board and the consumers were required to be borne in mind and protected while fixing the tariff. The Commission could not have arrogated to itself the superintendence and control of the Board on the pretension of watching and protecting the larger interests of the Board and the consumers.

21. For the foregoing reasons, all the appeals are accepted. The impugned orders of the Commission are set aside.

November 21, 2007(sd) **(Surjit Singh), J**